United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 24, 2007

TO : Joseph P. Norelli, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

512-5036-0850

SUBJECT: Super Store Industries 512-5042-0133-2500
Case 20-CA-33274 512-5042-3320

This case was submitted for advice as to whether the Employer violated the Act by granting improvements in its medical insurance plan to unrepresented employees, while withholding those improvements from employees who recently voted for union representation. We conclude that the Employer did not violate the Act, as there is no evidence of an unlawful refusal to bargain or an unlawful motive, and the action was not accompanied by unlawful statements.

FACTS

Super Store Industries (the Employer) is engaged in the production, packaging, and distribution of milk products with several facilities, including one located in Fairfield, California. Approximately 47 of the 115 employees at the Fairfield facility are drivers, the remainder being production employees, loading and checking employees, and clerical employees. Prior to January 2007, all of the Employer's employees received the same medical benefits.

In April 2006, the Employer announced that it would be implementing a new medical insurance plan for all employees, effective in June 2006. The new plan, for the first time, required that employees meet a "calendar year" deductible. During enrollment meetings held in April and May, employees expressed concern to the Employer over the fact that the calendar year deductible would start over again in only six months, beginning in January 2007.

In November 2006, Teamsters Local 490 (the Union) began organizing the drivers at the Employer's Fairfield facility, and filed the petition in Case 20-RC-18114. An election was held on December 20, with a majority of votes cast for the Union. The Employer timely filed objections to the conduct of the election.

In January 2007, the Employer decided to make improvements to the employee's medical insurance plan for all of its employees except the drivers at the Fairfield facility. As a result, all of the employees other than those in the Fairfield drivers' unit would receive increased coverage for certain prescription allergy medications and would no longer be subject to the calendar year deductible starting over after only six months. When drivers inquired about the insurance plan changes applying to everyone in the company except them, an Employer official explained that it was not a punishment for the drivers and that the Employer could not legally make changes to their terms and conditions of employment "at the present time," i.e., while the representation case was ongoing. The Employer official added that it was lucky that the annual pay raise did not come around until October, rather than in February, because this law would also apply to pay raises, and the Employer official expressed the hope that everything would be worked out and settled by then. The Union did not make any request to bargain with the Employer about employees' medical insurance benefits prior to certification.

On January 31, 2007, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(1) and (3) of the Act by implementing improvements in the terms of the medical insurance it provided its unrepresented employees while withholding the same improvements from the drivers, who had voted for union representation.

The Employer asserts that it was motivated to grant the January 2007 improvements in medical insurance benefits by information it received during employee health fairs held in August and October 2006. In particular, the Employer claims that composite "Workforce Health Profiles" compiled at these fairs demonstrated that allergies were a more serious and prevalent problem for its employees than previously thought, and that employee complaints about the resetting of the calendar year deductible showed a greater level of employee concern and dissatisfaction about this issue. The Employer contends that the only reason that it did not extend these improved medical insurance benefits to unit employees was its view that taking such action unilaterally would violate Section 8(a)(5) of the Act. The Region's investigation has adduced no evidence that would belie the Employer's contentions, or indicate that the Employer was motivated by anti-Union animus or an intention to discourage union activity. The Region has concluded that none of the Employer's statements to employees constituted independent violations of Section 8(a)(1) because, in these circumstances, the Employer's statements

were not coercive. These conclusions have not been submitted for advice.

On April 11, 2007, the Board certified the Union as the representative of the Employer's Fairfield drivers' unit.

ACTION

We conclude that the Employer did not violate the Act, as there is no evidence of an unlawful refusal to bargain or an unlawful motive, and the action was not accompanied by unlawful statements.

It is well established that the grant of benefits to unorganized employees, but not to employees represented by a union, is not unlawful standing alone.[1] Such conduct will be found to violate the Act, however, if there is independent evidence of an unlawful motive for the grant of benefits,[2] if the action is accompanied by "statements encouraging the employees to abandon collective representation in order to secure the benefits,"[3] or if the employer unlawfully refuses to bargain about the benefits after certification.[4]

Moreover, while an employer's obligation in deciding whether to grant benefits to employees prior to a representation election is "to decide the question precisely as it would if the union were not on the scene,"[5] a new

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[1] See, e.g., Phelps Dodge Mining Co., 308 NLRB 985,995-996 (1992), enf. denied 22 F.2d 1493 (10th Cir. 1994), quoting B. F. Goodrich Co., 195 NLRB 914, 915 (1972) and Shell Oil Co., 77 NLRB 1306, 1310 (1948). See also, e.g., Empire Pacific Industries, Inc., 257 NLRB 1425, 1425-1426 (1981) (no violation where employer granted wage increase only to employees not represented by union and bargaining was thereafter voluntarily suspended pending resolution of a decertification petition).

[2] See, e.g., Phelps Dodge Mining Co., 308 NLRB at 996.

[3] B.F. Goodrich Co., 195 NLRB at 915 fn 4.

[4] See, e.g., Id. at 915; L.M. Berry and Company, 254 NLRB 42, 44 (1981).

[5] MEMC Electronic Materials, Inc., 342 NLRB 1172, 1191 (2004), quoting United Airlines Services Corp., 290 NLRB

duty, not present during the pre-election period, attaches after a union has won the election. This standard imposes liability on employers who make unilateral changes post-election. Thus, "absent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made."[6] Where the final determination on the objections results in the certification of a representative, the Board has long held that the employer violated Section 8(a)(5) and (1) for having made such unilateral changes.[7]

Finally, it is also settled law that an employer does not violate the Act merely by refusing to initiate collective bargaining pending final Board resolution of timely filed election objections, prior to certification.[8] A Section 8(a)(5) violation does not arise in such circumstances unless there is additional evidence, drawn from the employer's "whole course of conduct," which proves that its refusal to bargain is part of a bad faith effort to avoid its bargaining obligation.[9]

Applying these principles to the instant case, we conclude that the Employer did not violate the Act. Thus, the Employer has offered a legitimate business justification for the January 2007 improvements in medical insurance benefits -- it claims to have been motivated to make the improvements by information it received during employee health fairs held in August and October 2006, and claims that it did not extend these improved medical

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954, 954 (1988). See also, e.g., Noah's Bay Area Bagels, LLC, 331 NLRB 188 (2000) (employer violated the Act by withholding generally applicable changes in medical insurance benefits from a group of employees for whom a representation petition had been filed, but an election not yet held).

[6] Mike O'Connor Chevrolet-Buick-GMC Co., Inc., 209 NLRB 701, 703 (1974), enf. denied on other grounds 512 F.2d 684 (8th Cir. 1975).

[7] Ibid.

[8] Howard Plating Industries, Inc., 230 NLRB 178, 179 (1977).

[9] Id.

insurance benefits to unit employees because it believed that taking such action unilaterally would violate Section 8(a)(5) of the Act. While the timing of these changes may raise an inference of improper motive, such an inference is not a sufficient basis upon which to find a violation in the absence of evidence that would belie the Employer's contentions, or indicate that the Employer was motivated by anti-Union animus or an intention to discourage union activity, as discussed above.

Indeed, as there are no proffered "compelling economic considerations" that required the Employer to grant the drivers the improved medical insurance benefits, a unilateral grant of the benefits to the drivers after the election would certainly have violated Section 8(a)(5) of the Act, pursuant to Mike O'Connor Chevrolet, supra.[10] We recognize that the Employer could have foregone unilateral action by choosing to bargain with the Union as the putative representative of the drivers' unit based on the election results, and resolved the benefits issue in that manner.[11] The Employer did not violate the Act by failing

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[10] We note that the grant of the improved medical insurance benefits at issue here was not an established term or condition of employment prior to the election, but was instead a newly-implemented change in terms and conditions. Thus, it was not until after the election that the Employer decided to make this change; there was no earlier indication or conclusion to do so, much less one providing reasonable certainty as to the terms, timing, and criteria of the changes in benefits such to constitute an established term or condition of employment, regarding which bargaining would not be required. See, e.g., Mid-Continent Concrete, 336 NLRB 258, 268 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); Maple Grove Health Care Center, 330 NLRB 775, 780 (2000); Eugene Iovine, Inc., 328 NLRB 294 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001); Dynatron/Bondo Corp., 323 NLRB 1263, 1265 (1997), enfd. in relevant part 176 F.3d 1310 (11th Cir. 1999). Thus, the grant of benefits in the instant case is properly distinguished from the employer conduct at issue in Wells Fargo Alarm Services, 224 NLRB 1111 (1976), in which the Board found that the employer's post-election withholding of a previously decided-upon across-the-board wage progression violated Section 8(a)(1) of the Act.

[11] See, e.g., Lamonts Apparel, 317 NLRB 286, 288 (1995).

to do so, however, as the union had not yet been certified and, in any case, the Union never made any request to bargain about employees' medical insurance benefits prior to certification.

Moreover, none of the Employer's statements constituted independent violations of Section 8(a)(1), as they were not coercive, and they made no attempt to encourage employees to abandon collective representation in order to secure the benefits. Rather, the Employer at all times made clear that it was not seeking to punish the drivers, but rather was constrained by its legal position "at the present time," and that it contemplated a time when the representation case would be resolved and the benefits issues could be settled. Therefore, based on all these factors, we conclude that the Employer did not violate the Act by granting improvements in its medical insurance plan to unrepresented employees, while withholding those improvements from employees who recently voted for union representation.

Accordingly, the Region should dismiss the charge in the instant case, absent withdrawal.

B.J.K.